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IN THE

Supreme Court of the United States

October Term, 1972
No. 71-1637

THE CITY OF BURBANK, et al.,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., et al.,

Appellees.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Supreme Court Rule 16, appellees move
that the final judgment of the United States Court of
Appeals for the Ninth Circuit be affirmed without further
argument on the ground that the decision below is mani-
festly correct.

OPINIONS BELOW

The opinion of the court of appeals, reported in 457
F.2d at 667, is set forth in Appendix A to the appellants'
jurisdictional statement. The district court opinion is

reproduced in Appendix C of the supplement to the appendix of the jurisdictional statement ("Supp. App.") and reported in 318 F. Supp. at 914. The findings of fact and conclusions of law made by the district court are in Appendix D of the supplement.

QUESTIONS PRESENTED

1. Was the court of appeals correct in holding that the Burbank curfew ordinance is invalid under the Supremacy Clause because the city is purporting to exercise its police power in an area which has been preempted by the federal government?
2. Was the court of appeals correct in holding that the Burbank curfew ordinance is invalid under the Supremacy Clause because the ordinance is in conflict with an order of the Federal Aviation Administration applicable to nighttime flight operations at the Hollywood-Burbank Airport and with the federal statutory right of free transit through the navigable airspace?"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Art. VI, cl. 2 of the United States Constitution, reads as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;

- Should the Court note probable jurisdiction, the following additional issues would be presented and briefed: (a) Does the Burbank ordinance constitute an invalid attempt to regulate a phase of the national commerce which, because of the need of national uniformity, demands that its regulation be prescribed by a single authority; or (b) does the burden imposed on interstate commerce by enforcement of a local curfew render the Burbank ordinance invalid? In addition to holding the ordinance invalid on the Supremacy Clause grounds, the district court reached these Commerce Clause issues and answered each in the affirmative. The court of appeals did not find it necessary to go beyond the Supremacy Clause.

and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Burbank ordinance No. 2216 (the "curfew ordinance"), held invalid below, added section 20-32.1 to the Burbank Municipal Code. It provides as follows:

"Sec. 20-32.1 Aircraft Take-Offs.

"(a) Pure Jets Prohibited from Taking Off Between 11:00 P.M. and 7:00 A.M.

"It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(b) Airport Operator Prohibited from Allowing Take-Offs.

"It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(c) Exception: Emergencies.

"This Section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off."

STATEMENT

1. Nature of the Case and Prior Proceedings.

This is an appeal under 28 U.S.C. § 1254(2) from a decision of the United States Court of Appeals for the Ninth Circuit entered on March 22, 1972, which unani-

mously affirmed a judgment of the United States District Court for the Central District of California. The judgment declared invalid an ordinance of the City of Burbank which purports to impose a night curfew on jet aircraft takeoffs at Hollywood-Burbank Airport. Appellants are the City of Burbank and various of its officials responsible for enforcement of the ordinance. Appellees are Lockheed Air Terminal, Inc., owner and operator of the Hollywood-Burbank Airport, Pacific Southwest Airlines, an intrastate carrier, and the Air Transport Association of America, an unincorporated trade association consisting of some thirty-two United States scheduled interstate air carriers.

On March 31, 1970, the City Council of Burbank passed the curfew ordinance prohibiting takeoffs of jet aircraft from the Hollywood-Burbank Airport between 11:00 p.m. and 7:00 a.m. Following the effective date of the ordinance, Lockheed Air Terminal, Inc., the airport owner, and Pacific Southwest Airlines filed this action in the United States District Court for the Central District of California seeking to have the ordinance declared unconstitutional and to enjoin its enforcement. The Air Transport Association of America was permitted to intervene as a plaintiff. The Federal Aviation Administration appeared *amicus curiae* in support of plaintiffs, and the State of California appeared in that capacity in support of defendants.

On September 24, 1970, after trial, the district court (Crary, J.) filed a memorandum opinion holding that the plaintiffs were entitled to declaratory and injunctive relief on both Supremacy Clause and Commerce Clause grounds. Supp. App. C. On November 30, 1970, the district court signed and filed its findings of fact and conclusions of law, Supp. App. D, and entered its judgment declaring the Burbank ordinance unconstitutional, illegal and void and enjoining its enforcement. R. 405.

Burbank sought review in the Ninth Circuit. Again, the Federal Aviation Administration and the State of California participated as *amici*. On March 22, 1972, the court (Browning, Duniway and Trask, J.J.) issued its opinion affirming the judgment of the district court.

2. The Relevant Facts.

The district court's detailed Findings (Supp. App. D), which are summarized below, provide the best available picture of the factual setting of this case. Appellants' "Statement of the Case" largely ignores the findings and fails to deal adequately with the facts relevant to the issues presented by this appeal.

(a) *The Hollywood-Burbank Airport.* Hollywood-Burbank Airport was dedicated on May 30, 1930, and has been in use since that time by regularly scheduled commercial aircraft and privately owned corporate and general aviation aircraft. The major portion of the Airport is within the City of Burbank, which has a population of 95,000. F.F. 6-7, Supp. App. at 37-38. It is the most convenient airport in the greater Los Angeles metropolitan area for the entire San Fernando Valley, Hollywood, and the cities of Burbank, Glendale, Pasadena and Alhambra, an area containing a population of 2.2 million persons. F.F. 14, Supp. App. at 40.

Hollywood-Burbank Airport is an important "satellite" airport in the national air transportation system.* It is included in the National Airport Plan promulgated by the Administrator of the Federal Aviation Adminis-

* Satellite airports, such as Hollywood-Burbank or Oakland International and San Jose Municipal in the San Francisco area, plan an essential role in the national air transportation system in relieving air and ground congestion, in reducing air-traffic delays at primary or "hub" airports, and in providing more convenient service to the surrounding population centers. This role has been recognized by the Civil Aeronautics Board in its route investigations. F.F. 11, 13, Supp. App. at 39; PX 35, at pp. 6-7; e.g., Pacific Northwest-California Investigation, C.A.B. Docket No. 18884, CCH Av. L. REP. ¶ 21, 932 (May 12, 1970).

tration pursuant to the Federal Airport Act of 1946, ch. 251, 60 Stat. 170, and forms a vital link in interstate and intrastate air commerce. F.F. 14, 17, Supp. App. at 40. In 1969 there were approximately 32,000 air carrier movements at Hollywood-Burbank Airport serving 1,178,000 commercial passengers in interstate and intrastate transportation. Approximately 97 percent of these operations were conducted by jet aircraft. F.F. 20, Supp. App. at 42.

(b) *The Curfew Ordinance.* Following enactment, Burbank city officials publicly announced their intention to enforce the ordinance. F.F. 9, Supp. App. at 39. Immediately, the curfew ordinance required PSA to cancel a regularly scheduled flight which it had operated for over two years serving an average of 125 passengers, 80 of whom were boarding at Hollywood-Burbank Airport. F.F. 61, Supp. App. at 54. And although Continental Air Lines was granted new authority from the CAB to commence regularly scheduled interstate service from Hollywood-Burbank Airport to Portland and Seattle, the curfew ordinance prevents Continental from filling out its service pattern by the addition of a southbound after-dinner flight. F.F. 65-66, Supp. App. at 55.

(c) *The Scope of Federal Regulation.* The Findings provide a comprehensive summary of the pervasiveness of federal regulation of all aspects of the use of the navigable airspace and aircraft operations generally and at Hollywood-Burbank Airport. The federal statutes and regulations governing air carrier operations are described in Findings 23-27; those with respect to certification of aircraft, airmen and airports are in Findings 28-33; those with respect to the framework of federal centralized management and control of navigable airspace are in Findings 34-40; those covering federal control of all aspects of aircraft flight operations are in Findings 41-47; those relating to the exercise of centralized management and control directed to achieving the

maximum efficient use of the navigable airspace, including flow control and high density traffic airport regulations, are in Findings 48-53; and those covering federal regulation of aircraft noise abatement are in Findings 54-57.

Each scheduled interstate air carrier that uses Hollywood-Burbank Airport holds a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board, which authorizes and obligates the carrier to engage in air transportation and to provide adequate service with respect to persons, property and mail over specified routes. F.F. 24, Supp. App. at 42. The Operations Specifications issued by the FAA to each scheduled air carrier require these carriers to operate their turbo-jet aircraft within the navigable airspace in accordance with instrument flight rules (IFR) and specifically authorize the use of Hollywood-Burbank Airport. F.F. 27, Supp. App. at 43.

Every portion of the flight of a commercial jet aircraft takes place under the direct control of an FAA facility, from the filing of a flight plan, through the assignment of a runway and clearance to taxi thereto, the takeoff clearance, the assignment of a standard instrument departure procedure and a radio beam intersection to which to fly, to the assignment of a standard instrument approach procedure and clearance to approach for landing on an assigned runway. F.F. 41-47, Supp. App. at 46-50.

(d) *The Efficient Use of Airspace.* In exercising centralized management and control over the navigable airspace of the United States, the FAA has as one of its statutory goals the efficient use of this airspace, which includes the expeditious movement of aircraft. A variety of techniques are used by the FAA to insure efficient use of the presently congested airspace, including the utilization of centralized flow control procedures and high density airport rules which are discussed, respectively,

in Findings 51-52 and 53-54 (Supp. App. at 50-52). F.F. 49-50, Supp. App. at 50.

As an aspect of effective airspace management, Lockheed is subject to federal regulation as owner and proprietor of Hollywood-Burbank Airport. The Federal Aviation Act of 1958 prohibits the establishment or construction of civil airports not receiving federal funds, such as Hollywood-Burbank, or even the substantial alteration of a runway layout, without prior compliance with regulations prescribed by the Administrator. 49 U.S.C. § 1350. This requirement was established "in order to assure conformity to plans and policies for, and allocation of, airspace by the Administrator. . . ." *Id.* The FAA also directly regulates Lockheed, as well as other airport operators, through the terms of the airport operator's certificate, without which no airport can serve carriers certificated by the CAB. F.F. 33, Supp. App. at 44; 49 U.S.C. §§ 1430(a)(8), 1432.

(e) *Noise Abatement Regulations.* Actions taken by the FAA to achieve noise abatement at airports generally are summarized in Findings 54, 55 and 57. Supp. App. at 52-53. Prior to the enactment of the Burbank curfew ordinance, the FAA took in hand the subject of nighttime takeoffs at Hollywood-Burbank Airport and acted to minimize the consequences of such operations by issuing the noise abatement order summarized in Finding 56. Supp. App. at 53. This order, which was issued by the FAA Chief of the Burbank Air Traffic Control Tower, establishes a preferential runway for departures of jet aircraft between the hours of 11:00 p.m. and 7:00 a.m. In issuing this order the responsible federal official announced his determination that the noise abatement procedures which it established were "designed to reduce community exposure to noise to the lowest practicable minimum." PX 30.

The FAA also employs its noise abatement authority in the field of aircraft design and performance. On November 18, 1969 regulations were adopted prescribing noise standards which must be met as a condition of type certification for new subsonic turbojet aircraft. 34 Fed. Reg. 18355, now published at 14 C.F.R. Part 36. And on October 30, 1970, the Administrator issued an Advance Notice of Proposed Rulemaking concerning "civil airplane noise reduction retrofit requirements." 35 Fed. Reg. 16980.

(f) *Effect on Commerce.* The district judge found that air commerce, by reason of its speed and volume, requires regulation by a single authority if it is to be conducted with maximum safety and so as to achieve efficient use of the navigable airspace. F.F. 59, C.L. 21, Supp. App. at 54, 66. The evidence was uncontradicted that air transportation problems are not amenable to solution by local regulation. Supp. App. at 29.

The district judge also found, upon the basis of uncontradicted testimony, that if the curfew ordinance were upheld, similar ordinances would be adopted by virtually all cities surrounding airports. F.F. 69, Supp. App. at 56. Such a proliferation would adversely affect the aviation industry, the members of the traveling public, and the national economy. F.F. 70, Supp. App. at 57. The imposition of curfew ordinances on a nationwide basis, the court found, would (1) drastically restrict the hours available for flight scheduling far beyond the curfew period, (2) severely impair the efficiency of the aircraft maintenance system, (3) require extensive rescheduling at enormous inconvenience and expense, (4) deteriorate air transportation service to the public, (5) increase the already serious congestion problem, and (6) intensify the noise problem in the hours immediately preceding the curfew, which is the period of greatest

annoyance to surrounding communities.* F.F. 67-68, 70-82, Supp. App. at 56-61. In sum, interstate commerce would be subjected to an unreasonable burden and interference. F.F. 83-84, Supp. App. at 61.

3. Decision of the District Court.

The district court held that the federal government has preempted the field of regulations governing and controlling the use of airspace and air traffic. From its analysis of the federal statutes and regulations, the court concluded that "Congress intended to centralize full and dominant control of the navigable air space in the Federal Government so as to provide for its safe and most efficient use." Supp. App. at 22. The court also held that local curfew legislation "would conflict with the certificated rights and obligations" of the air carriers. *Id.* at 28.

The district court also ruled that the Burbank ordinance would violate the Commerce Clause in two respects. First, based upon its holding that the effect of the ordinance is to be considered on a "national basis," the court held that the ordinance cannot stand because there would be a "very serious loss of efficiency as to the use of air space" and the carriage of interstate passengers and goods would be "seriously interrupted." Supp. App. at 28. Second, the trial court held that "air commerce, by reason of its speed and volume, requires a single authority in control if it is to be conducted at

* Each day, some 1,009 scheduled domestic interstate departures occur throughout the United States between 11:00 p.m. and 7:00 a.m., and all these flights would have to be cancelled if a curfew were imposed on a nationwide basis. F.F. 74, Supp. App. at 58. Continental Air Lines alone would have to cancel over 48 flights per day, and its operating costs would be increased by approximately 25 percent. F.F. 71-72, Supp. App. at 57. Other carriers would be similarly affected. F.F. 73, Supp. App. at 57.

Over 48 percent of the nation's air mail is carried during curfew hours. Nationwide imposition of a curfew would annually delay billions of pieces of mail at least one day in delivery.

(Footnote continued on next page.)

maximum safety and efficient use of the navigable air space." *Id.* at 29.

4. Decision of the Court of Appeals.

On March 22, 1972 the Ninth Circuit ruled the Burbank curfew ordinance invalid under the Supremacy Clause, finding it unnecessary to reach the Commerce Clause issue.

With respect to preemption, the court of appeals found that the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1301-1542, created a comprehensive scheme to deal with air commerce at the federal level and that the overall design of Congress was to centralize in a single authority the power to promulgate rules and regulations for the use of the nation's airspace. The court found that Congress, in amending the Act in 1968, 49 U.S.C. § 1431, underscored federal preemption of the field of aircraft noise regulation so as to exclude the exercise of State and local police power in this area. App. at 11-14.

The Ninth Circuit also held that the Burbank curfew ordinance conflicted with the federal scheme of aviation regulation when tested by the standards of *Perez v. Campbell*, 402 U.S. 637 (1971), because it "interferes with the balance set by the FAA among the interests with which it is empowered to deal . . ." App. at 18. The circuit noted that at the time the Burbank ordinance was passed, the FAA had already issued and put into effect preferential runway use procedures with respect to night operations designed to reduce aircraft noise in the vicinity of the Hollywood-Burbank Airport to "the lowest practicable minimum." The court held that the attempt by the City of Burbank to go beyond the noise abatement measures adopted by the FAA "frustrates the full accom-

F.F. 79, Supp. App. at 59. In addition, the air freight industry, which exists upon its ability to operate during curfew hours, would be required to cancel approximately 42 percent of the all-cargo services. F.F. 80-81, Supp. App. at 59-60.

plishment of the goals of Congress." *Id.* In addition, the court ruled that the effect of the curfew was to terminate the federal statutory right of free transit through the navigable airspace. *Id.* n.12. Judge Browning limited his concurrence to the conflict portion of the opinion.

ARGUMENT

A. Introduction and Summary.

The decision of the court of appeals is so plainly correct that it should be summarily affirmed without further argument. The Supremacy Clause requires affirmance both because the local regulation operates in an area pre-empted by the federal government and because it directly conflicts with federal action taken at the airport. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (pre-emption); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 40 U.S.L.W. 3479 (U.S. April 4, 1972) (preemption); *Perez v. Campbell*, 402 U.S. 637 (1971) (conflict).

As to preemption, the comprehensive Federal Aviation Act of 1958, as amended, 49 U.S.C. §1301, *et seq.*, displays an unmistakable congressional intention to occupy completely the fields of the regulation of aircraft operations and the use of navigable airspace. The 1968 amendment to the Act, 49 U.S.C. § 1431, makes explicit the FAA's responsibility with respect to the regulation of aircraft noise. And the federal statutory scheme has been elaborated upon by regulations rightly described as being "of formidable proportions, impressive detail, and manifest sophistication."* As the court of appeals said, the conclusion of preemption is "unavoidable."

* *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 228, 232, (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969).

The Burbank curfew ordinance intrudes into this exclusive federal domain. For the purpose of restricting aircraft noise, it would deny jet aircraft access to the navigable airspace for fully one-third of each day.* Federal occupation of the field precludes local bodies from exercising their police powers in this manner. Whether an airport operator could adopt comparable regulations in the exercise of its powers as a proprietor is not in issue in this case, since Burbank was attempting to exercise its police power with respect to an airport it neither owns nor operates.

Apart from the preemption issue, the holding of the court of appeals should be affirmed because of the clear and direct "conflict" between the Burbank ordinance and an FAA order. At the time the ordinance was enacted, aircraft operations at Hollywood-Burbank Airport were already subject to an FAA noise reduction order (BUR 7100.5B) which established a preferential runway system for departures between 11:00 p.m. and 7:00 a.m. The Burbank ordinance would make a nullity of the FAA order and would, as the court of appeals unanimously held, conflict and interfere with the balance set by the FAA among the interests with which it is empowered to deal. In addition, the curfew would interfere with the federally guaranteed right of free transit through the navigable airspace. The Supremacy Clause bars a local enactment which would so frustrate the full accomplishment of the goals of Congress. *Perez v. Campbell*, 402 U.S. at 649.

* The impact of such an ordinance on airline scheduling extends well beyond the period of any particular curfew and beyond the boundaries of the regulated airport. For example, the Burbank ordinance alone restricts the period that Continental may originate departures from Seattle to twelve hours of the day. F.F. 68, Supp. App. 55-56. And if curfews were adopted nationwide, departures between widely separated cities would be limited to less than one-third of the hours of the day. F.F. 68, Supp. App. at 56.

The supremacy of federal law with respect to aircraft operations and use of the navigable airspace has been upheld in an unbroken line of federal decisions. *American Airlines, Inc. v. City of Audubon Park, Kentucky*, 297 F. Supp. 207 (W.D. Ky. 1968), *aff'd*, 407 F.2d 1306 (6th Cir.), *cert. denied*, 396 U.S. 845 (1969); *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969); *Allegheny Airlines v. Village of Cedarhurst*, 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd*, 238 F.2d 812 (2d Cir. 1956); *United States v. City of New Haven*, 447 F.2d 972 (2d Cir. 1971). The long established federal supremacy in this field, underscored as to aircraft noise by the explicit 1968 amendment to the Act, warrants affirmance of the ruling below without further argument.

B. The Preemption Issue.

In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), this Court stated, in the disjunctive, the classic tests for determining whether federal legislation has preempted a given field:

“[i] The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. [ii] Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. [iii] Or the state policy may produce a result inconsistent with the objective of the federal statute.” (Citations omitted.)

Both the district court and the court of appeals found that all three of the *Rice* tests were satisfied. C.L. 14-16,

Supp. App. at 64; App. at 8. This conclusion of federal preemption is correct.

The cornerstone of the statutory scheme involved here is the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1301-1542. The United States is declared "to possess and exercise complete and exclusive national sovereignty in the airspace of the United States." 49 U.S.C. § 1508(a). The Act recognizes and declares to exist "in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." 49 U.S.C. § 1304. The Act then authorizes and directs the Federal Aviation Administrator:

"[T]o develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace." 49 U.S.C. § 1348(a).

This section, termed the "heart" of the Act in Senate Report No. 1811, 85th Cong., 2d Sess. 14-15 (1958), emphasizes the dual purpose of federal regulation over air commerce: (i) "to insure the safety of aircraft," and (ii) to insure "the efficient utilization of such airspace." The legislative history of the Act illuminates the purpose of Congress to "vest in a single Administrator plenary authority for airspace management." S. REP. No. 1811, at 15; *see Id.* at 13-15.

To enable the FAA to fulfill the Act's broad mandate, Congress conferred upon the Administrator wide ranging powers over all aspects of aircraft navigation. For example, the Administrator is authorized to develop plans and formulate policy with respect to the use of navigable airspace and allot the use of such airspace as he deems proper, 49 U.S.C. § 1348(a); prescribe rules

governing the flight of aircraft, including rules for the "efficient utilization of the navigable airspace" as well as "for the protection of persons and property on the ground," 49 U.S.C. § 1348(c); prescribe certain types of equipment aircraft must utilize, 49 U.S.C. § 1423(a)(1); issue airworthiness certificates to aircraft which are in a condition for safe operation, 49 U.S.C. § 1423(c); issue air carrier operating certificates specifying the federal airways over which each carrier is authorized to operate, 49 U.S.C. § 1424(b); and issue airman certificates specifying the capacities in which the holders are authorized to serve, 49 U.S.C. § 1422(a).

An explicit provision relating to the Administrator's responsibilities and authority in the area of aircraft noise was added to the statutory scheme in 1968 by the passage of what is now section 611 of the Act, providing:

"In order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, the Administrator of the Federal Aviation Administration, after consultation with the Secretary of Transportation, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom *and shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom . . .*" 49 U.S.C. § 1431(a).* (Emphasis added.)

* Burbank argues that federal preemption of the field of aircraft noise regulation, which was underscored by the passage of the 1968 amendment, requires a reexamination of this Court's opinion in *Griggs v. Allegheny County*, 369 U.S. 84 (1962). J.S. at 15-16. There is no merit to such a contention. The invalidation of Burbank's attempt to exercise its police power involves altogether different issues than the claimed "taking" without the payment of just compensation involved in *Griggs*. No Fifth Amendment claim is presented by this case. R. 102, 117-18. Nor are the Ninth and Tenth Amendments, which Burbank would belatedly invoke, involved. *Id.*

As the court of appeals held, this amendment "gives the Administrator power to deal with noise that is offensive to persons on the ground, including the noise created by low-flying aircraft, takeoffs and landings, and the noise created by aircraft on the ground at airports." App. at 13.

The legislative history of this 1968 amendment supports the holding of the court below that Burbank could not use its police power in the field of aircraft noise regulation. Senate Report No. 1353, 90th Cong., 2d Sess. at 6-7 (1968) states:

"H.R. 3400 [now 49 U.S.C. § 1431] would merely expand the Federal Government's role in a field already preempted. It would not change this pre-emption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." 2 U.S. Code Cong. & Ad. News 2694 (1968).

Burbank's reliance on comments in the legislative history regarding powers of an airport proprietor is misplaced, as that issue is not before the Court. What is involved in this case is the validity of Burbank's attempted exercise of police power, not the power of a proprietor.*

In exercising his powers, the Administrator of the FAA must take into account a wide range of considerations.

* Although the 1968 Senate Report indicates that an airport could refuse to accept service by larger and noisier aircraft, the scope of the power of an airport proprietor to impose noise restrictions is an unresolved issue involving difficult constitutional, statutory and contractual issues. See Opinion of the Justices, ___ Mass. ___, 271 N.E.2d 354, 358-59 (1971). But those issues are not involved in this case because the City of Burbank is not the proprietor of Hollywood-Burbank Airport.

See 49 U.S.C. § 1303. The court of appeals pointed out that these considerations include not only environmental protection but also safety, efficiency, technological progress, and common defense. App. at 10. Congress, the court of appeals emphasized, has given the FAA the responsibility and authority "to resolve the proper balance among the multiple purposes." *Id.*

Pursuant to his statutory authority and responsibility, the Administrator has issued complex and detailed operational rules and regulations controlling the flight of aircraft, 14 C.F.R. Parts 91, 93, 95 and 97, and governing the use of the navigable airspace, 14 C.F.R. Parts 71, 73, 75, and 77. In exercising his noise abatement authority, the Administrator has issued regulations governing aircraft design and performance, 14 C.F.R. Part 36, and has prescribed modified flight procedures. These regulations, as they are applicable to this case, are highlighted in the trial judge's findings. F.F. 34, 35, 38-47, 54-57, Supp. App. at 45-50, 52-53.

Against this background, the court of appeals held that "the pervasiveness of federal regulation in the field of air commerce, the intensity of the national interest in this regulation, and the nature of air commerce itself require the conclusion that State and local regulation in that area has been preempted." App. at 8. To allow local regulation to supplement this comprehensive federal regulation would risk upsetting "the delicate balance struck by the FAA under the aegis of federal law." App. at 10.*

* As it did in each of the lower courts, the State of California has filed an *amicus* brief supporting Burbank. The State's argument is predicated on the unsupported assertion that the curfew serves to implement national environmental policy. Brief at 16-17. However, the trial court found on the basis of uncontradicted evidence that curfew ordinances would actually aggravate, not relieve, the noise problem by causing a bunching of flights in the hours immediately preceding the curfew — the period of greatest annoyance to surrounding communities. This result, said the court, "is totally inconsistent with the objectives of the federal

C. The Conflict Issue.

Even absent federal preemption of an area, a local statute which has the effect of bringing local and federal policies directly into conflict must bow to the supremacy of national enactments. *See, e.g., Perez v. Campbell*, 402 U.S. 637, 649 (1971); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230-31 (1964). The test for the existence of such a "conflict" was stated in *Perez* as follows:

"Three decades ago MR. JUSTICE BLACK, after reviewing the precedents, wrote in a similar vein that, while '[t]his Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, ha[d] made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference[,] . . . [i]n the final analysis,' our function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)." 402 U.S. at 649.

Prior to the passage of the Burbank ordinance, the FAA had issued and put into effect an order designed to reduce community exposure to noise in the vicinity of Hollywood-Burbank Airport "to the lowest practicable minimum." This order, BUR 7100.5B, established a preferential runway to be assigned by the Air Traffic Control Tower for all jet departures between 11:00 p.m. and 7:00

statutory and regulatory scheme." F.F. 78, Supp. App. at 59. Moreover, as the court of appeals held, the general commitment of environmental problems to local regulation under section 202(b) of the Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371(b), "does not overcome the preemptive nature of Congress' particular commitment of air commerce problems to the federal domain." App. at 15.

a.m.* The Burbank ordinance was held to be in conflict with this FAA order because it would make the order a nullity and go beyond the noise abatement measures determined by the FAA to constitute "the lowest practicable minimum." The municipal ordinance, said the court, "interferes with the balance set by the FAA among the interests with which it is empowered to deal, and frustrates the full accomplishment of the goals of Congress." App. at 18.

The court of appeals recognized that the local ordinance was in conflict with federal law in another respect as well. Under the Federal Aviation Act, the United States is declared "to possess and exercise complete and exclusive national sovereignty in the airspace of the United States." 49 U.S.C. § 1508(a). The Act declares that "there is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." 49 U.S.C. § 1304. The circuit court held that "the effect of this curfew was to terminate the right of flight of prospective passengers" through a portion of the airspace for one-third of the hours of every day. App. at 18 n.12. This holding is clearly in accord with this Court's recognition that such local prohibition of a federally guaranteed right must fall before the Supremacy Clause. *Sperry v. Florida ex. rel. Florida Bar*, 373 U.S. 379, 385 (1963).

* Appellants' unsupported assertion that the FAA noise abatement runway use order is "non-mandatory" (J.S. at 18) is contradicted by the findings and testimony. The trial court found that pursuant to this order, "the preferential runway is assigned by the FAA control tower [between 11:00 p.m. and 7:00 a.m.] by incorporation into an aircraft's departure clearance as an instruction to the pilot." F.F. 56, Supp. App. at 53. And any person violating an air traffic control clearance or instruction is subject to a civil penalty. See 49 U.S.C. § 1471; 14 C.F.R. § 91.75. The testimony showed that the preferential runway established by the order was used except for a "few occasions" when the control tower permitted deviation because of unusual weather or operating conditions affecting safety. R.T. 380, 387.

An additional ground of conflict was found by the district court to invalidate the ordinance. Basing its ruling upon the holding in *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954) (Supp. App. at 28-29), the court found and concluded that the Burbank ordinance conflicted with the federally certificated rights and obligations of air carriers:

“The Burbank curfew ordinance, by imposing a local veto for a period of hours over the navigable air-space, constitutes a restriction on carriers in fulfilling their statutory duty [to provide adequate service over specified routes, 49 U.S.C. § 1374(a)] and is tantamount to a partial suspension of the Certificates of Public Convenience and Necessity issued to interstate air carriers operating out of Hollywood-Burbank Airport.” Supp. App. at 65.

The court of appeals decision does not discuss this ground.

D. The Prior Precedents.

In earlier cases, the lower federal courts have consistently struck down local regulations which have attempted to invade the exclusive federal domain of regulation of aircraft operations and the use of navigable airspace. And when asked, this Court has declined to review these decisions. Moreover, no previous decision of this Court is inconsistent with the ruling of the court of appeals in this case. For these reasons, this appeal does not present an issue worthy of oral argument.

1. *Lower Federal Decisions.* Closely in point is the case of *American Airlines, Inc. v. City of Audubon Park, Kentucky*, 297 F. Supp. 207 (W.D. Ky. 1968). There the defendant city's ordinance prohibited overflights below 750 feet. Planes landing at and taking off from the Louisville, Kentucky airport, in accordance with FAA procedures, flew at heights below this level. The trial

court found the ordinance to conflict with the Federal Aviation Act and regulations promulgated thereunder, and to operate in an area preempted by Congress. *Id.* at 212. The court of appeals, in a *per curiam*, affirmed the district court on all grounds. 407 F.2d 1306 (6th Cir. 1969). *Certiorari* was denied. 396 U.S. 845 (1969).

American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967), involved an ordinance of the Town of Hempstead prohibiting noises within the town of over a specified level and duration. Hempstead is situated near John F. Kennedy International Airport. Jet aircraft taking off from and landing at this airport produced noises beyond the permissible levels set by the ordinance. The district court found that the ordinance operated to forbid noise only by forbidding flight, and, as such, operated in a preempted area. *Id.* at 230-31. "The federal regulation of air navigation and air traffic is so complete that it leaves no room for such local legislation as the Hempstead Ordinance." *Id.* at 233.

The district court also found that the ordinance was in conflict with the federal action in the area. After citing direct conflicts between FAA landing and takeoff procedures and the requirements of the ordinance, the court stated:

"The conflict, however, is also subtler. Local initiative in noise control of aviation is inherently an effort to regulate a consequence while disclaiming regulation of the cause. It cannot coexist with a comprehensive system of federal regulation of aircraft manufacture (through certificates of airworthiness) and federal regulation of air navigation and air traffic." *Id.* at 235.

On appeal, the decision of the district court was affirmed on conflict grounds. 398 F.2d 369 (2d Cir. 1968). This Court denied *certiorari*. 393 U.S. 1017 (1969).

United States v. City of New Haven, 447 F.2d 972 (2d Cir. 1971), involved a dispute between the Town of East Haven and the City of New Haven as airport operator over acquisition by New Haven of land for use as a "clear zone" at the end of an extended runway. The runway had been extended pursuant to federal grant agreements between the airport and the FAA to facilitate the use of jet aircraft. Although the runway extension was within the City of New Haven, the City purchased 73 acres in East Haven for use as a "clear zone." The Connecticut Supreme Court ruled that New Haven had not obtained the land in East Haven in accordance with Connecticut law. It ordered New Haven to cease operating the runway at its extended length and thereby using the "clear zone" it had improperly acquired.

The United States obtained a preliminary injunction in the federal district court restraining the enforcement of the state court order and directing that East Haven move the Connecticut court for dissolution of its order. The court of appeals upheld the federal court injunction on the basis of the supremacy of federal control over use of the navigable airspace. The court said:

"Under the Federal Aviation Act of 1958 (49 U.S.C. § 1301 et seq. as amended) the United States has asserted that it possesses and exercises 'complete and exclusive national sovereignty in the airspace of the United States.' 49 U.S.C. § 1508(a). . . . State legislation purporting to deny access to navigable air space would therefore constitute a forbidden exertion of the power which the federal government has asserted." 477 F.2d at 973.

In *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 132 F. Supp. 871 (E.D.N.Y. 1955), the district court held that the comprehensive scheme of the 1938 Civil Aeronautics Act, the predecessor of the Federal Aviation Act of 1958, and the regulations adopted pursuant thereto,

"have regulated air traffic in the navigable airspace in the interest of safety to such an extent as to constitute preemption in that field. . . ." 132 F. Supp. at 881. As a consequence, the court struck down an ordinance, enacted by a town adjacent to New York's Idlewild Field, prohibiting flights over the town at an altitude of less than 1000 feet. The court of appeals affirmed. 288 F.2d 812 (2d Cir. 1956).

Thus for some 17 years the district courts and courts of appeals have uniformly struck down local ordinances attempting to regulate aircraft operations or use of navigable airspace and, when asked, this Court has declined to review those decisions.

2. *State Court Decisions.* In the recent decision in *Opinion of the Justices*, — Mass. —, 271 N.E.2d 354 (1971), the highest court in Massachusetts held invalid proposed legislation which would prevent nonconforming supersonic airplanes from landing or taking off anywhere in Massachusetts if the noise they emitted exceeded a specified level. The justices found the proposed law, which was based upon police power and not proprietary power, invalid under the Supremacy Clause.

"[T]he principles expressed in that [*Hempstead*] case and the comprehensive character of the Federal air statutes and regulations, existing even prior to 1968, lead us to conclude that the proposed Massachusetts legislation would intrude upon an area preempted by the Congress." 271 N.E.2d at 358.

The lower state court cases of *Stagg v. Municipal Court*, 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (1969), J.S. at 11, and *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 A.2d 692 (1969), J.S. at 11 n. 14, cited by Burbank, are inapposite.

Stagg involved a curfew regulation adopted by the proprietor of the Santa Monica Municipal Airport,

which serves no scheduled commercial air traffic. Therefore, that case is not analogous to the attempt of Burbank to regulate with its police power an airport which it neither owns nor operates and where there are scheduled interstate and intrastate operations.* Moreover, the *Stagg* decision was rendered without any consideration of the important 1968 Amendment to the Federal Aviation Act, 49 U.S.C. § 1431, the accompanying legislative history, or any of the recent noise control measures taken by the FAA.

The case of *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 A.2d 692 (1969) (cited in J.S. at 11 n.14), appears also to have been decided without considering the 1968 Amendment to the Act and the accompanying regulatory developments. In that case the trial court was asked to enjoin a planned expansion of a small, noncommercial airport and certain operational features of that airport. It did issue an "experimental" injunctive order requiring a jet curfew, after finding no preemption by the federal government, at least where no scheduled, certificated carriers were involved. 261

* As it did in the court of appeals, Burbank has attempted to supplement the record in this case by appending and relying upon the FAA's response to the *Petition of Jordan A. Dreifus*. That petition, which was turned down by the FAA, requested the federal government to impose a night curfew at the Santa Monica Airport. In its *amicus* brief to the Ninth Circuit, the FAA pointed out the distinctions between the Santa Monica and Hollywood-Burbank situations and stated:

"It is important to bear in mind that the *Dreifus* opinion stemmed from a request for Federal regulatory action of a type which the FAA considered as not being appropriate. (Appendix to Brief of Appellants at 12.) The FAA in the *Dreifus* opinion did not endorse the Santa Monica type curfew ordinance or intend by its action to encourage a multiplication of such restrictions on airport use by state and local governments, whether or not they acted as proprietors. . . . The FAA filed its brief *amicus curiae* in this case because it realizes that the proliferation of this type of local ordinance would stagnate and destroy the national air transportation system." FAA Brief at 25.

A.2d at 701. However, the trial court's order is presently on appeal within the state court system. And on July 17, 1972 the United States filed an action in the federal court in New Jersey to compel the dissolution of the state court-imposed curfew. *United States v. Town of Morristown*, Civil No. 1214-72, D.N.J.*

3. *The Supreme Court Precedents.* The decisions of this Court referred to by Burbank are not inconsistent with the decision below. The case of *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (cited in J.S. at 16) is inapposite on the preemption point for the reasons set forth in the opinion of the court of appeals. App. at 10-11.

Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963) (cited in J.S. at 17), is also inapplicable. There the Court held that the Federal Aviation Act does not express an intention to preempt state anti-discrimination legislation. Assuming that the Civil Aeronautics Board had power to bar racial discrimination with respect to customers and employees, the Court found that the enforcement of a Colorado statute to bar racial discrimination in hiring by air carriers did not frustrate the purpose of the federal legislation "at least so long as any power the Civil Aeronautics Board may have remains 'dormant and unexercised'...." 372 U.S. at 724 (footnote omitted). The Court noted that a different situation would be presented "if the federal authorities seek to deal with discrimina-

* In *Loma Portal Civic Club v. American Airlines, Inc.*, 61 Cal.2d 582, 39 Cal. Rptr. 708 (1964), cited by Burbank, J.S. at 14, 16, plaintiffs failed in their efforts to enjoin certain commercial jet flight operations. Although the court declined to find federal preemption of "all aspects" of air transportation (61 Cal. 2d at 591-92, 39 Cal. Rptr. at 714), the decision preceded the important 1968 amendment to the Federal Aviation Act, 49 U.S.C. § 1431, and the subsequent FAA noise control regulations. A similar request for injunctive relief was denied in *Virginians for Dulles v. Volpe*, 4 E.R.C. 1232 (E.D. Va. May 26, 1972).

tion in hiring practices and their power to do so is upheld." *Id.* at 724 n.22. In the instant case the FAA clearly has the power to act in the area in question, and has done so.

Equally inapposite are cases such as *Braniff Airways v. Nebraska State Board*, 347 U.S. 590 (1954) (cited in J.S. at 17), where the Court found that state power to tax aircraft had not been preempted by the predecessor of the Federal Aviation Act of 1958. The court below did not find that the federal government has preempted every conceivable aspect of aviation. The preemption in question relates to the fields of the regulation of aircraft operations, the use of navigable airspace, and aircraft noise incident to air commerce. It is the attempted invasion of those specific areas which invalidated the Burbank ordinance.*

Head v. New Mexico Board, 374 U.S. 424 (1963) (cited in J.S. at 17), simply held that the nature of the regulatory power given the FCC was not sufficient to indicate a congressional intention to preempt all the detailed state regulation of professional advertising practices, "particularly when the grant of power to the Commission was accompanied by no substantive standard other than the 'public interest, convenience, and necessity.'" 374 U.S. at 431. That case is in no way analogous to the present situation where the FAA, in response to a specific congressional mandate, has adopted comprehensive regulations governing aircraft operations, the use of the navigable airspace and aircraft noise.

* Similarly, the preemption holding of the court below is not inconsistent with this Court's ruling in *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 40 U.S.L.W. 4391 (U.S. April 19, 1972), that the federal statutes do not evidence a congressional purpose to preempt state power to levy charges designed to help defray the costs of airport construction and maintenance. *Id.* at 4395. The preemption here relied upon does not extend to that fiscal area.

Rice v. Chicago Board of Trade, 331 U.S. 247 (1947) (cited in J.S. at 18), was a companion case to *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 218, which was relied upon by the court below as setting forth the standards by which preemption is to be determined. *Board of Trade* considered the preemption aspects of a different statute, and the Court merely determined that the Commodity Exchange Act, unlike the United States Warehouse Act considered in *Santa Fe Elevator*, did not evidence a congressional intent to make its regulatory features exclusive in the area. This decision is completely in accord with the ruling below.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be summarily affirmed.

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